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No. 05-1387

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SUPREME COURT, U.S.

In the Supreme Court of the United States

LARRY ALAN WARCH,
Petitioner,

v.

THE OHIO CASUALTY INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

JAMES ALAN LIPS, SR.
Counsel of Record
RACHEL S. ZAHNISER
TAFT, STETTINIUS & HOLLISTER LLP
425 WALNUT STREET, SUITE 1800
CINCINNATI, OH 45202-3957
(513) 381-2838

Counsel for Respondent
The Ohio Casualty Insurance Company

Becker Gallagher Legal Publishing, Inc. 800.890.5001

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are Petitioner Larry Alan Warch and Respondent The Ohio Casualty Insurance Company.

The parent company of The Ohio Casualty Insurance Company is Ohio Casualty Corporation, which is a publicly held corporation owning 10% or more of the stock of The Ohio Casualty Insurance Company. No other publicly held company owns 10% or more of the stock of The Ohio Casualty Insurance Company.

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STATEMENT OF THE CASE

Petitioner Larry Alan Warch ("Warch") brought this action against his former employer, Respondent The Ohio Casualty Insurance Company ("OCIC"), alleging, *inter alia*, age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. Warch responded to OCIC's motion for summary judgment by arguing that he had presented a prima facie case of presumed discrimination under the "pretext" method analysis approved by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Alternatively, Warch argued that he could prove to a reasonable jury by the "direct" method analysis that he was the victim of intentionally motivated discrimination. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278 (1989). After analyzing the claim by both methods, the district court granted OCIC's motion for summary judgment. In analyzing the prima facie case requirements of the pretext method analysis, the district court held, and the Fourth Circuit affirmed, that Warch failed to establish the second element that he was meeting OCIC's legitimate job expectations and the fourth element that he was replaced by a substantially younger employee. Applying the direct method analysis, the district court held, and the Fourth Circuit affirmed, that Warch failed to present sufficient direct or circumstantial evidence to permit a reasonable jury to consider whether his age was a motivating factor in the decision to discharge him.

Warch's two issues addressed his prima facie case under the pretext method analysis. No issue was raised to this Court about the direct method analysis.

STATEMENT OF THE FACTS

The Fourth Circuit and the district court found the following facts were undisputed by Warch. On December 1, 1998, OCIC hired Warch as an Investigator in the Special Investigations Unit ("SIU"), the business unit responsible for investigating fraudulent claims, when it purchased the personal lines business unit of his employer, Great American Insurance Company ("GAI"). Warch admitted that he had difficulty changing the work practices he followed with GAI and accepting and/or readily adapting to OCIC's requirements for all of its SIU Investigators.

On March 1, 2000, Bill Johansen, Assistant Vice President and SIU Director in the Claims Department, sent Warch a letter following up on "several issues pertaining to [Warch's] performance and efforts," and explaining how one of Warch's supervisors had discussed SIU procedures with him "on several occasions" and how there continued to be "shortcomings" that "adversely impact[ed his] personal performance and that of the unit." JA 274. Johansen directed Warch to "adopt immediately all procedures and guidelines of our SIU." *Id.* On August 20, 2000, another manager warned Warch about improper comments he had entered in the company-wide computerized case activity log.

In February 2001, Bruce Montgomery became the Director of Field Operations for the SIU. Bruce Montgomery required more rigorous standards of performance for SIU Investigators than his predecessor and changed or at least interpreted and applied prior procedures differently. Warch presented no evidence that management applied these standards differently to any other SIU investigator.

On March 12, 2001, Montgomery met with Warch and counseled him on a variety of performance shortcomings, advising him that the files he had turned in "lacked any investigative effort," that he "had little or no communication with the claims reps assigned to the case," that he was not leaving his home to conduct field assignments, that he provided "inappropriate" responses to the claims staff that created complaints, and that he needed to "listen more carefully." JA 276-78. Warch responded that he "understood" and "agreed" that the identified problems existed. *Id.*; JA 109-12.

On May 24, 2001, Montgomery issued a formal counseling to Warch for his "failure to conduct thorough, concise and proper investigations" and "failure to communicate with [the] claims [department]," and OCIC informed Warch that he would be placed on probation if he failed to improve. JA 279.

On December 6, 2001, Montgomery and Robert Burgess, Warch's immediate supervisor, reviewed several of Warch's files with him and placed him on formal probation for 60 days for "work product unacceptable" due to "failure to conduct thorough, concise and factual investigations, failure to acknowledge referrals and provide timely communications to claims reps. Work product unacceptable and not according to policy and procedures." JA 280. Warch did not deny responding that he needed to address several deficiencies.

By mid-January 2002, Warch had been counseled three more times about his work deficiencies. In late January 2002, Burgess, Montgomery, and SIU Manager David Hasler finalized Warch's performance evaluation for 2001 and agreed to rate him as "Not Effective" in two out of the five major performance categories ("Customer-Driven Quality"

and "Innovation"). He was given an overall performance rating of "Marginal Performance." In the "Employee Comments" section, Warch did not deny his performance deficiencies; he admitted that this "rating is acceptable"; and he offered family problems as "an excuse for [his marginal] performance." JA 289.

On January 30, 2002, Montgomery extended Warch's probation by 30 days, and on March 8, 2002, he extended it again for 60 days, explaining:

> We have identified the problems to you many times and each time you state that you understand and then we receive files with the same problems. I feel at this point that we have been more than fair in identifying the problems, explaining what is needed to correct them and the rest will be up to you.
>
> . . . [T]he problems that we see in your work . . . are across the board. You must improve these issues during this extended probationary period.

JA 291.

By mid-April, Warch had been counseled five more times in writing for his continuing work deficiencies. On April 23, 2002, Montgomery and Burgess once again reviewed Warch's performance, and Montgomery again extended Warch's probation to June 6, 2002, for: "Continuing failure to conduct thorough, concise, and proper investigations. Making recommendations to pay claims without gathering all the facts and using all tools given to conduct such investigations. Failure to communicate timely with claims." JA 297.

On April 25, 2002, when Montgomery reported Warch's negative response to his April 23 probation renewal to SIU Manager Hasler, Hasler decided to cancel Montgomery's latest probation extension and discharge Warch for "unsatisfactory performance," effective April 26, 2002, explaining:

> I determined that we had given--we had spent all the time we could afford to spend to get an employee's performance up to an acceptable level, and we have taken all of the steps that we could take and not seen any indication that performance was going to get to that level, which is why I decided to terminate Mr. Warch.

JA 157-58.

REASONS FOR DENYING THE PETITION

The sole contention for invoking this Court's jurisdiction on both issues listed below was that the Fourth Circuit's decision conflicts with decisions by other circuits of the court of appeals. Warch has failed to show such conflicts justifying this Court's review of either issue. Since the second issue should be so obviously denied certification and such denial would moot the first issue, the second issue will be initially addressed.

A. Warch's Second Issue Questioning His Failure To Establish The Replacement Element Of The Prima Facie.

Warch's second issue challenged the Fourth Circuit's holding that he failed to establish the fourth prima facie case requirement that he was "replaced" by a substantially younger

employee. Warch cited no case from any other circuit conflicting with the Fourth Circuit's holding in the context of his individual discharge. Warch's reliance on *Collier v. Budd Co.*, 66 F.3d 886 (7th Cir. 1995), to establish such a conflict is misplaced. The Seventh Circuit acknowledged that replacement of an older employee by a younger employee satisfies the fourth element of the prima facie case except when the termination was due to a reduction in force, noting that: "Generally, when a company reduces or restructures its work-force, it does not simply hire a new person to fill the discharged employee's old position." *Id.* at 890.

Warch is entitled to no such relief from the requirement that as a dischargee for poor performance he must show he was replaced by a substantially younger employee before a presumption of discrimination is established. The Fourth Circuit affirmed the district court's fact-based determination that Warch was not terminated as part of a workforce reduction, stating:

> Warch has presented no evidence that he was actually terminated as a part of a reduction in force. OCIC never told Warch he was "downsized" or "laid off" because of a loss of business or budgetary needs. In fact, OCIC's Hasler concluded that, because there were still previously issued policies in place, "there will still be claims on those, and there were open claims on those at the time, so it's hard to estimate how long it would take for all of that business to roll off."

Pet. App. 16a (internal citations omitted).

The Fourth Circuit also found that Warch did not show he was replaced, "much less by a substantially younger

employee." Pet. App. 15a. Warch argued that the reassignment of his caseload to existing employees established the replacement element, but the petition presented no issue relating to this principle that has been dealt with by many circuit courts and resolved in favor of OCIC's position. Even if raised in the petition, such fact-based determinations do not warrant this Court's review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Unable to cite a circuit court decision permitting an employee discharged for poor performance to be relieved of establishing that he was replaced by a substantially younger employee,[1] Warch argued his same circumstantial evidence of age discrimination--ageist statements allegedly made by Montgomery and Burgess and alleged manipulation of a performance audit by Montgomery to lower Warch's audit score--should be sufficient to establish the fourth element of the prima facie case. In support of this argument, Warch relied on dictum in *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). However, the Seventh Circuit

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[1] *Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445 (7th Cir. 1998), does not address the replacement element; plaintiff's claim was denied for failure to establish he was meeting his employer's legitimate performance expectations. *Id.* at 453 n.4. In *Montana v. First Federal Savings and Loan of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989), the court rejected a requirement that plaintiff establish the replacement element after she was terminated through a reduction-in-force and structural reorganization. Neither *Cengr* nor *Montana* held that an employee discharged for poor performance was relieved of his obligation to establish he was replaced by a substantially younger employee in order to create a prima facie case of presumed discrimination.

did not hold that circumstantial evidence could be used to establish the replacement element. Rather, this evidence was identified as the first of three types of evidence necessary to prove discrimination "because of" age. The second type of evidence identified was that similarly situated employees outside the protected class received better treatment. *Id.* The third type was "evidence that the plaintiff was qualified for the job in question but passed over in favor of (***or replaced by***) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination"--*i.e.*, the *McDonnell Douglas* burden-shifting approach. *Id.* (emphasis added).

Troupe confirms that Warch's proposed use of circumstantial evidence of discriminatory motive to satisfy the replacement element of the prima facie case should not be considered prior to the pretext analysis. Neither the district court nor the Fourth Circuit reached the pretext analysis because no prima facie case was established.

Furthermore, the Fourth Circuit and district court considered and rejected Warch's circumstantial evidence under the more lenient "mixed motive" analysis used in non-age discrimination cases. Pet. App. 19a ("[E]ven when we consider Warch's circumstantial evidence, he fails to create a genuine dispute on his claim under the mixed motive approach."). Warch's petition did not raise an issue about the Fourth Circuit's rejection of his circumstantial evidence of intentional discrimination.

By offering this same evidence as a substitute for establishing the replacement requirement, Warch attempted to have the Court conflate both: (i) the prima facie case requirements of the pretext method analysis with the

requirements of the direct motive analysis, and (ii) the prima facie case requirements necessary to ultimately shift the burden on Warch to show by such evidence that OCIC's reasons for his discharge were pretextual. Such conflation would completely undermine the two methods of analyzing discrimination claims which have been approved and fine-tuned over more than the past 30 years to guide the judicial analysis of discrimination claims.

Since Warch cannot show there is a conflict in the circuits raised by the Fourth Circuit's decision that he failed to establish the indispensable element of replacement, the petition must be dismissed for failure to establish a prima facie case.

B. Warch's First Issue Questioning His Failure To Establish The Qualification Element Of The Prima Facie Case.

1. The First Issue Need Not Be Decided.

Even if, *arguendo*, the Fourth Circuit's decision that Warch failed to establish the second element of the prima facie case requirement, that he was qualified for his job, conflicts with the Sixth Circuit's holding in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) and other decisions, the issue is moot in this case. Regardless of how the Court would resolve this issue, it would not permit Warch's complaint to be reinstated.

This Court has recognized that even where a circuit court's decision is in conflict with another circuit court, a petition for a writ of certiorari should not be granted if the court below provided an alternate ground allowing the Court to dispose of the case without reaching the merits of the

disputed issue. *See Lawson v. Murray*, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring). This is such a case.

2. Warch Failed To Establish The Qualification Element.

Even if the Court were to relieve Warch of failing to establish the replacement element of a prima facie case and accept review of one or more aspects of Warch's "qualification" issue, his claim could not survive because he failed to present any competent evidence that he was meeting OCIC's legitimate performance expectations at any relevant time during his employment.

Relying on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993),[2] and *Cline*, Warch contended that he met OCIC's performance expectations prior to the events leading up to his termination--presumably, before Montgomery became the head of the SIU. In support of his argument, Warch pointed to his overall performance rating of "Good" for the period of March 21, 2000 to December 31, 2000, and his 3% merit increase. Warch ignored the facts that he complained about this appraisal and salary increase and considered his rating "minimal." JA 238-39.

The undisputed and admitted objective, competent evidence cited in the statement of facts, *supra*, demonstrates

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[2] Warch's petition read *Hicks* too broadly. In *Hicks*, the petitioners did not challenge the district court's finding that the respondent satisfied the prima facie case, and therefore this Court did not address whether the respondent was required to show that he was meeting his employer's performance expectations prior to the events leading to his termination or at the time of his termination. *Hicks*, 509 U.S. at 506.

that Warch was not meeting OCIC's legitimate performance expectations either prior to this evaluation or during the 15 months leading up to his discharge.

The Fourth Circuit properly rejected Warch's argument that OCIC improperly used only subjective criteria to evaluate his performance, finding:

> Warch argues that OCIC's criticisms were too subjective to be considered at the prima facie stage. This complaint will not avail Warch because, if for no other reason, the facts do not support it.
>
> * * * *
>
> Warch similarly contends that counseling he received in May 2001 was not specific and used only general and subjective language. We disagree.

Pet. App. 13a (internal citations omitted). This fact-based ruling does not warrant this Court's review. Sup. Ct. R. 10. Furthermore, no issue was raised regarding this holding.

CONCLUSION

For the foregoing reasons, Warch has failed to carry his burden of demonstrating "compelling reasons" for the petition to be granted, and it should be denied. Sup. Ct. R. 10.

Respectfully submitted,

JAMES ALAN LIPS, SR.
Counsel of Record
RACHEL S. ZAHNISER
TAFT, STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
(513) 381-2838

Counsel for Respondent
The Ohio Casualty Insurance Company

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